

The 1948 Act is written law and s 2(a) thereof prescribes a period of limitation in respect of the suits, actions or proceedings referred to therein.

Section 33 of the 1953 Act does state that 'the Act shall apply to proceedings by or against the government in like manner as it applies to proceedings between subjects'. But those words in the sections are prefaced by 'save as in this Act otherwise provided and without prejudice to the provisions of s 3 of this Act'. Section 3 does indeed provide otherwise. It takes cases for which a period of limitation is provided by any other written law out of the Limitation Act of 1953.

But that is not the end of the matter. Two contentions by or on behalf of the plaintiff call for further consideration.

The first is the allegation that the money paid to the customs for the purposes of excise duty had been fraudulently utilized for some other purpose.

Such an act cannot be said to be an act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection of the Public Authorities Protection Act cannot be invoked.

The second matter is the complaint that the government had deliberately not brought up the question of non-payment of excise duty until the three years had passed. One question that arises from this is the question as to when time began to run as against the government. The principles discussed in *Anns v Merton London Borough Council*¹ apply. Whether the protection provided by the 1948 Act is available could only be decided after a clearer picture of the facts are known to the court to enable it to decide when time began to run as against the government.

The application is dismissed with costs without prejudice to the fourth defendant's right to raise or plead the protection of the Public Authorities Protection Act or the Limitation Act when the facts are clearer.

Application dismissed.

Solicitors: *Anthony Fernandez & Partners.*

Reported by *Ng Sheau Jiuan*

A **Erria Shipping Pte Ltd v Cara Timur Transport Sdn Bhd**

HIGH COURT (SIBU) – SUIT NO 258 OF 1985
CHONG SIEW FAI J
12 SEPTEMBER 1988

B *Revenue Law – Withholding tax – Commission for shipbroking services claimed by non-resident company – Whether commission subject to withholding tax – Whether payer of commission entitled to deduct withholding tax – Income Tax Act 1967, s 109B(1)(b)*

The plaintiff was a company incorporated in Singapore carrying on the business of a shipbroker and shipping agent. It applied for summary judgment against the defendant for S\$27,362.50 as commissions payable by the defendant in respect of a charterparty relating to a vessel owned by the defendant. The defendant sought to plead in its defence that only S\$17,844.17 was owing to the plaintiff as S\$9,518.33 was paid to the Inland Revenue Department as withholding tax pursuant to s 109B of the Income Tax Act 1967 ('the Act'). The central issue before the court, therefore, is whether the commission earned by the plaintiff is subject to Malaysian withholding tax under s 109B(1) of the Act such that the defendant, as the payer thereof, is legally obliged or entitled to deduct the tax thereon upon paying the commission to the plaintiff.

Held, allowing the application:

E (1) It is obvious that the commission payable is not for technical advice rendered, under the terms of s 109B(1)(b) of the Act. Even if sub-s (1)(b) extends to 'assistance or services' of a non-technical nature, there is no evidence that the amount claimed is 'in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme'. There is nothing to indicate or suggest that the plaintiff had been involved in any technical management or administration or that the commission earned was in respect of any specialized or technical services rendered.

F (2) It has also not been indicated that the commission claimed was deemed to be derived from Malaysia under s 15A of the Act because there is no evidence suggesting that at the material times the management and control of the business or businesses or affairs of the defendant were exercised in Malaysia. Nor has evidence been adduced or reliance placed suggesting that condition (iii) of s 15A of the Act is applicable.

G (3) The defendant has failed to satisfy the court on a balance of probabilities that there exists any arguable or triable issue or that for some other reason there ought to be a trial respecting the balance of the plaintiff's claim.

H

Legislation referred to

Income Tax Act 1967 ss 4A, 8(1)(b), (c), 15A, 109B(1)

Chew Peng Hui for the plaintiff.
Belinda Hui for the defendant.

I

Cur Adv Vult

Chong Siew Fai J: This application of the plaintiff against the defendant contains two parts:

(a) judgment in the sum of S\$17,844.17 on admission by the defendant in its defence filed in this action; and

(b) summary judgment under O 14 in the sum of S\$9,518.33 being the balance of the plaintiff's claim with interest and costs.

As regards relief (a) above, by consent, leave to enter judgment was granted. Relief (b), however, was contested.

The plaintiff is a company incorporated in Singapore carrying on the business of shipbroker and shipping agent. Its case is that the whole of its claim of S\$27,362.50 is commission payable by the defendant to the plaintiff in respect of a charterparty dated 22 March 1982 relating to a vessel MV 'Jeta' owned by the defendant. The defendant did not deny that the sum S\$27,362.50 was commission. However, it admitted owing only S\$17,844.17 which it sought to plead in its defence as having been arrived at as follows:

Balance due to plaintiff	S\$27,362.50
Less: Pursuant to s 109 of Malaysian Income Tax Act 1967 withholding tax of 15% on total commissions paid to non-resident company	
	<u>S\$ 9,518.33</u>
	<u>S\$17,844.17</u>

Although s 109 of the Income Tax Act 1967 (hereinafter referred to as 'the Act') was pleaded, it became obvious in the course of the defence submission that s 109B of the Act was relied upon.

The affidavit evidence reveals that initially the charterparty was entered into by one Forison Lines Pte Ltd of Singapore whose obligations thereunder including the payment of commission to the plaintiff were taken over by the defendant when the defendant bought over the vessel MV 'Jeta'.

As regards the charterparty, one point needs to be made. In para 3 of Lau Nai Ho's affidavit affirmed on 19 March 1986 and filed on behalf of the defendant, the charterparty was said to have been made between Forison Lines Pte Ltd and the plaintiff company. However, in the course of submission on behalf of the defendant, Mr Chen conceded that the charterparty was entered into by Forison Lines Pte Ltd with one Sabah Shell Bhd and not with the plaintiff company. In his submission Mr Chen also accepted that the commission claimed by the plaintiff was in respect of services rendered as a broker.

The basis of the defendant's denial of the plaintiff's claim for the balance S\$9,518.33 rests on the contentions that Forison Lines Pte Ltd (original party to the charterparty) being a foreign company, the Act does not apply to Forison, that the defendant had paid to the Inland Revenue Department in Malaysia the said sum S\$9,518.33 being the amount allegedly due pursuant to s 109 and

109B of the Malaysian Income Tax Act 1967 and that by reason thereof the plaintiff has no right to claim the said sum from the defendant. (See Lau Nai Ho's affidavit affirmed on 19 March 1986.)

It appears obvious that s 109 which relates to 'interest' and 'royalty' (as defined in s 2) has no application to the instant case. Indeed the section was not resorted to in the course of the submission on behalf of the defendant. However, reference was feebly made to s 4(f) of the Act, but this was soon abandoned, it being conceded that even if the amount came within the category of s 4(f), which was not pleaded, there was no statutory provision such as that of s 109B requiring the defendant to withhold tax on the amount payable.

The case of the defendant rests mainly, if not solely, on ss 4A, 15A and 109B of the Act. Firstly, it may be noted that all these sections deal with the same types or classes of incomes. In other words, the description of the types or classes of incomes in all those sections are the same. (See s 4A(i), (ii) and (iii), s 15A(a), (b) and (c) and s 109B(l)(a), (b) and (c).)

Secondly, while s 4A makes the three categories of income derived from Malaysia by a non-resident person (which, by definition, includes a company) chargeable to tax, and s 15A enacts that upon fulfilment of certain conditions specified therein those categories of income are 'deemed to be derived from Malaysia', s 109B empowers the payer to withhold tax payable to a non-resident person in respect of the three categories of income earned by the latter.

The central issue therefore is whether the commission earned by the plaintiff company is subject to Malaysian withholding tax under s 109B(l) of the Act such that the defendant as the payer thereof is legally obliged or entitled to deduct the tax thereon upon paying the commission to the plaintiff. It must be made clear that the issue for determination is whether the defendant is statutorily entitled to deduct the amount under s 109B(1) and *not* whether the plaintiff company is liable to pay tax in Malaysia on the commission earned. If the commission earned by the plaintiff company is not caught by s 109B(1), then the fact that the defendant had on its own accord paid the sum S\$9,518.33 to the Inland Revenue Department is, in my opinion, no answer, in law, to the claim of the plaintiff company for judgment respecting the residual claim in this action. Putting it another way, the question is whether, having regard to the evidence and circumstances of the case, the commission payable by the defendant to the plaintiff is such that the defendant is statutorily obliged under s 109B(1) to withhold the tax thereon (accepting that the commission is chargeable income).

If the defendant is obliged to so withhold, that would be a complete answer to the plaintiff's residual claim in this action. But if the defendant is not, then the plaintiff's claim must succeed despite the fact that the defendant had paid the sum to the Inland Revenue Department.

In this connection, counsel for the defendant conceded that the commission earned by the plaintiff did not fall under s 4A(i) and (iii) of the Act. In view of the similarity of the description, this must also mean that it does not come under s 109B(1)(a) and (c) thereof. The question then is: Does it come within category (b) of s 109B(1) of the Act? So far as is relevant, s 109(1) provides:

Where any person (in this section referred to as 'the payer') is liable to make payments to a non-resident –

- (a) ...
- (b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or
- (c) ...

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:
Provided ...

I have earlier on in this judgment dealt with the nature of the plaintiff's claim. It is commission arising out of a charterparty relating to the vessel MV 'Jeta' payable to the plaintiff, the payment of which was originally the responsibility of Forison Lines Pte Ltd but was subsequently undertaken by the defendant company which purchased the said vessel. It is obvious that the commission payable is not for technical advice rendered. But even if the said sub-s (1)(b) extends to 'assistance or services' of a non-technical nature, there is no evidence that the amount claimed is 'in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme'. There is nothing to indicate or suggest that the plaintiff had been involved in any technical management or administration or that the commission earned was in respect of any specialized or technical services rendered.

Furthermore and strictly on a point of evidence, it has not been indicated that the commission claimed was deemed to be derived from Malaysia under s 15A of the Act because there is no evidence suggesting that at the material times the management and control of the business or businesses or affairs of the defendant company were exercised in Malaysia. (Section 8(1)(b) and (c) of the Act.) Nor has evidence been adduced or reliance placed

A suggesting that condition (iii) of s 15A of the Act is applicable.

B On the evidence and materials available, the defendant has failed to satisfy me on a balance of probabilities that there exists any arguable or triable issue or that for some other reason there ought to be a trial respecting the balance of the plaintiff's claim in this action. Accordingly, the application succeeds. There will be judgment for the plaintiff against the defendant in the sum of S\$9,518.33 being balance of the plaintiff's claim with interest at 8% pa from today until payment and costs to be taxed unless agreed.

C *Application allowed.*

Solicitors: *Battenberg & Talma; Lau & Co.*

Reported by *Ng Sheau Jiu*

D

Kwong Yik Finance Bhd v Mutual Endeavour Sdn Bhd & Ors

E HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C2-23-3353-86
SITI NORMA YAAKOB J
10 AUGUST 1988

Banking – Guarantee – Loan secured by charge on property and guarantee – Whether creditor could proceed against guarantor before foreclosure of charged property finalized – Action in personam under contract of guarantee distinct from action in rem – No abrogation of plaintiff's right in charge document to elect which security it wished to realize

G *Contract – Guarantee – Loan secured by charge on property and guarantee – Whether creditor could proceed against guarantor before foreclosure of charged property finalized – Action in personam under contract of guarantee distinct from action in rem – No abrogation of plaintiff's right in charge document to elect which security it wished to realize*

H The plaintiff granted a loan to the first defendant upon the securities of a legal charge on a piece of property belonging to the second defendant, and a joint and several guarantee of both the second and third defendants. Following their defaults, the plaintiff applied for summary judgment against the first defendant as the principal debtor and the second and third defendants as guarantors. The application was allowed and the defendants appealed against that decision of the senior assistant registrar. In the appeal, the second and third defendants contended that the plaintiff could only proceed against them if there was a shortfall in the proceeds of sale realized by the foreclosure of the second defendant's charged property.

I **Held**, dismissing the appeal:

The guarantors' liabilities were personal liabilities and were in no way affected by the charge created by the second defendant in favour of the plaintiff. In any event, the presence of cl 28 in the charge documents, which sought to cover the